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## FISCAL IMPACT REPORT

SPONSOR HBEC ORIGINAL DATE 03/03/15  
LAST UPDATED \_\_\_\_\_ HB 409/HBECS  
SHORT TITLE Pregnant Worker Accommodation Act SB \_\_\_\_\_  
ANALYST Daly

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		\$5.0		\$5.0	Nonrecurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to and may Conflict with CS/HB 37 and SB 375.  
Relates to HM 2.

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Workforce Solutions Department (WSD)  
Attorney General's Office (AGO)  
Department of Health (DOH)

### SUMMARY

#### Synopsis of Bill

The House Business Employment Committee substitute for HB 409 amends the state Human Rights Act (HRA) to add pregnancy as a protected class under the HRA, preventing discrimination against pregnant women as a result of that condition.

It also enacts a new section of the HRA making it unlawful for an employer (that employs 20 or more employees or an agent or person or entity acting on that employer's behalf) to deny a request for reasonable accommodation made by a pregnant employee if: (1) that request is based on advice of her health care provider that accommodation is medically advisable; and (2) that accommodation will not cause the employer undue hardship. This section sets out procedures and timelines governing the handling of a request for accommodation, including notice provisions both for the employer and the employee, proper handling of emergency requests, when a medical certification may be required, and conditions governing an employee's return from leave.

Reasonable accommodation means a change in the work environment or in the way a job is

customarily performed that an employer implements or authorizes to effectively enable a pregnant employee to perform the essential functions of her job. It includes:

- modifying work duties or schedules;
- allowing for a reduced work schedule;
- providing furniture or acquiring modified equipment or devices;
- providing reasonable break time and the use of a room or other location close to the employee's work area;
- transferring an employee; or
- granting paid or unpaid leave.

Undue hardship means an accommodation requiring significant difficulty or expense when considered in light of the following:

- the nature and cost of the accommodation;
- the financial resources of the employer involved in the provision of the reasonable accommodation;
- the number of workers employed by the employer;
- the effect on expenses and resources;
- the impact otherwise on the employer's business;
- the overall financial resources of the employer;
- the overall size of the business; the type and operation of the employer;
- the type of operation of the employer, including the composition, structure and functions of the work force of the employer; and
- the geographic separateness or administrative or fiscal relationship to the employer of the employer's facilities.

## **FISCAL IMPLICATIONS**

WSD reported in its earlier analysis that it will need to provide printed material relating to changes such as that proposed in CS/HB 409, which it estimated will cost \$5 thousand.

## **SIGNIFICANT ISSUES**

AGO advised in its earlier analysis that the protections such as those provided in this substitute are closely related to those provided pregnant women under the Americans with Disabilities Act (ADA). 42 USC sections 12101-12213. It pointed out the ADA requires employers to provide certain workplace accommodations to certain disabled employees unless undue hardships would result for the employer. See Section 12112(5)(A). Although the ADA does not explicitly identify pregnancy as a disabling condition, extensive amendments in 2008 liberalized the definition of "disability," see Section 12102, and it is now generally accepted that certain pregnancy-related maladies such as hypertension, gestational diabetes, severe nausea, sciatica, abnormal heart rhythms, and depression may be covered disabilities within the meaning of the ADA.

Under the ADA, AGO commented, states are permitted to enhance the protections extended under the federal law, but may not enact provisions which fall below the ADA's baseline. See Section 12201. Thus, to the extent that CS/HB 409 undermines or provides lesser protections

than the ADA, it potentially runs afoul of federal law. AGO pointed to provisions of the earlier bill similar to those in CS/409 that were plainly at odds with the provisions of the ADA: the ADA generally applies to employers employing 15 or more employees, while the protections in CS/HB 409 applies only to employers employing 20 or more employees. Further, AGO advised the ADA generally defines a disability as a “physical or mental impairment that substantially limits one or more of the major life activities of [an] individual,” while CS/HB 409 provides a different standard. See Section 3(A)(1), (J), (Q)(3). Similarly, while CS/HB 409 largely tracks the ADA’s definition of “undue hardship,” it includes a vague and general provision that permits inquiry into “the impact otherwise of the accommodation upon the employer’s business.” Section 3(Q)(6)(e). Additionally, in its earlier analysis, DOH called attention to the ADA’s requirement that an individual must be a qualified individual who can perform essential functions of the job with or without accommodation, which is not a consideration in CS/HB 409.

However, AGO concluded it is important to bear in mind that legislation that provides express protections for pregnant women (which the ADA does not), like CS/409 – separate and apart from the ADA – is likely consistent with federal law and likely would withstand judicial scrutiny.

Since CS/SB 409 amends the HRA to add these protections for pregnant employees, it is clear that at least the state is liable for discriminating against pregnant employees the same as a private employer. See Section 21-1-13(D), NMSA 1978.

### **CONFLICT, RELATIONSHIP**

This substitute relates to and may conflict with CS/HB 37, which also enacts a separate Pregnant Worker Accommodation Act, and requires reasonable workplace accommodations for an employee affected or disabled by pregnancy absent an undue hardship upon the employer, including unpaid leave for a period of time up to three months. That bill applies to employers employing four or more employees.

CS/HB 409 also relates to and may conflict with SB 375, which enacts the New Mexico Family Act, which allows employees to request unpaid medical leave for specified reasons, including their own serious health issues and to bond with a newborn or newly adopted minor child. It also provides a reasonable level of compensation (similar to that of unemployment compensation) during this unpaid leave.

It is also related to HM 2, Parental Paid-Leave Working Group, which group would develop recommendations for the establishment of a parent paid-leave program funded by a publicly managed fund containing contributions by private and public employees and employers that funds up to eighty percent of a protected employee’s regular pay for up to twelve weeks for childbirth and to care for newborn, newly adopted or newly placed foster children.

### **OTHER SUBSTANTIVE ISSUES**

DOH reported in its earlier analysis that in the area of health significance, data collected through the Pregnancy Risk Assessment Monitoring System (PRAMS) from women who have recently delivered in New Mexico showed that in 2011, almost a third of women (29.7 percent) experienced severe nausea, vomiting or dehydration during their pregnancy. Also, 14.4 percent and 10.6 percent had high blood pressure and gestational diabetes (diabetes developed during

pregnancy) diagnosed during their pregnancy respectively. The presence of these medical conditions would require adequate monitoring and treatment by a health care provider and can impact work capacity and capability.

Further, DOH reported that, when considering potential health conditions present in pregnancy, that same data from 2011 showed that the presence of medical conditions in pregnancy, in this case high blood pressure and gestational diabetes, disproportionately affected certain race groups. High blood pressure was noted in non-Hispanic whites (18.1%) over Hispanic (13.0%) women, but gestational diabetes was more than doubled in the Hispanic women (13%) as compared to non-Hispanic white women (5.6%).

#### **TECHNICAL ISSUES**

HB 37 and HB 409 have the same short titles but are not duplicate bills.

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